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No. 07-1552

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IN THE

Supreme Court of the United States

BICO STUPAKOFF AND RUSSELL JAMES,
Petitioners,

v.

OTTO (GMBH & CO KG), OTTO DOOSAN LTD.,
AND OTTO SUMISHO INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

Respondents offer a host of far-reaching equitable arguments against Petitioners' constitutional claims, boldly suggesting that "it is inconceivable that the Bankruptcy Court ever would have granted relief permitting Petitioners to pursue Respondents" given, *inter alia*: the consideration paid for the Release and Injunction; the relative culpability of the Respondents; the alleged availability of relief against other parties; and the Petitioners' alleged delay. (Opp. 29-36.) In essence, Respondents argue that Petitioners'

constitutional claims are subject to an equitable balancing test wherein the alleged harm to Respondents and other parties *outweighs* Petitioners' right to notice.

In making this argument, Respondents have perfectly framed the critical due process dispute raised by the Petition. Contrary to Respondents' argument, and setting aside their distortions of the equities, *there is no balancing process when it comes to due process*. *Mullane*'s requirement of notice and opportunity for hearing is an absolute, baseline requirement. The level of notice required may be flexible and case-dependent, but if the minimum required level of notice is not provided, any resulting order or judgment is a nullity that can *never* be enforced. Thus, an order approving a bankruptcy plan release and injunction, procured through constitutionally insufficient notice, can never become enforceable against parties who did not affirmatively seek to enforce their rights within the "reasonable time" contemplated by Rule 60(b).

Contrary to Respondents' suggestion, a substantial and mature circuit split persists on this important issue. The majority of federal circuits endorses Petitioners' position. (Pet. 16.) *See* 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862 (2d ed. 1995) (void judgment "cannot acquire validity" because of laches). In these circuits, the "reasonable time" requirement of Rule 60(b) does not give courts discretion to reject challenges to the enforceability of orders entered without notice. (Pet. 21-22.)

Consistent with the *minority* view, the court of appeals in this case rejected the majority rule, holding that the bankruptcy court had discretion to

dismiss as untimely (under Rule 60(b)) Petitioners' request for a declaration that the Release and Injunction were unenforceable for lack of notice. (Pet. App. 4a.) Unless this Court grants review, Petitioners will now be foreclosed from challenging the validity of the Release and Injunction, effectively making it enforceable. This Court should grant certiorari to resolve this conflict among the federal circuits.

1. Respondents assert that Petitioners are asking this Court to review an issue that "was not litigated in (or decided by) any of the three courts below." (Opp. 11.) This argument completely misses the mark. Petitioners' claim that the Release and Injunction are void and unenforceable against them due to lack of notice was the central issue of the adversary proceeding and briefing below. (JA545-46; JA820.) Moreover, citing many of the same cases they rely on now, Petitioners argued below that, because the Release and Injunction is unenforceable against them, they were not required affirmatively to modify or vacate confirmation *at all*. (Reply App. 15a-17a.[1]) Petitioners have consistently argued that Rule 60(b) (with its limitations) is inapplicable to their due process claims. (Reply App. 13a-15a; JA820 n.3, JA830.) The proceedings below more than adequately support the question framed in the Petition.[2]

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[1] Petitioners' Reply Brief to the District Court on appeal of the dismissal of the adversary proceeding is reproduced as Appendix A.

[2] The exact question presented need not have been litigated below. A party who raised a *claim* below "can make any argument in support of that claim." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Likewise, the party may "frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Id.* at 535.

Respondents argue that "the entire focus of the Petition is the newfound assertion that Petitioners sought relief from a 'void' judgment under Rule 60(b)(4)." (Opp. 11.) This is Respondents' reinvention of the issue, not the issue Petitioners presented. Petitioners *do not* claim that they sought relief explicitly or implicitly under Rule 60(b)(4). To the contrary, Petitioners continue to deny that any part of 60(b) applies to or limits their ability to pursue their request for relief.[3] The only reason that 60(b) has become an issue is that *Respondents* insisted (and the bankruptcy court agreed) that Petitioners' adversary proceeding should be treated as a 60(b) motion.[4]

Respondents cite two pages of bulleted quotations purporting to show that Petitioners did not assert below that the confirmation order was "void." (Opp.

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[3] Some of Petitioners' cases hold that 60(b)(4) motions seeking to vacate a void judgment or order are not subject to the "reasonable time" requirement. But the principle that underpins these cases—as well as the cases that do not deal with 60(b)(4)—is that a void order can never become valid through the passage of time. This broad principle applies to *any* request for relief based on voidness, whether brought under 60(b)(4) or as a separate proceeding (as here).

[4] Respondents note that Petitioners raised Rule 60(b)(4) in their Reply to the court of appeals but argued that they *met* the reasonable time limitation, rather than that it did not apply. (Opp. 18.) Respondents take this argument out of context. Petitioners never abandoned their position that "the Photographers were not obliged to plead their claims under Rule 60." (Opp. 62a.) They merely argued, in the alternative, that they met the requirements of both 60(b)(4) and 60(b)(6), which, under current Second Circuit law, include seeking relief in a reasonable time. Petitioners' argument does not contradict or foreclose review of the broader proposition that 60(b) limitations do not apply.

14-16.) This is a semantic game. Petitioners have always made clear that they seek "a declaration that, because of the lack of notice and due process afforded, the Release and Injunction cannot be enforced against them." (Opp. 14.) The true point of these quotations is that, beyond declaring the order unenforceable as to them, Petitioners do not ask the bankruptcy court to vacate, rescind, or hold void the *entire order*. This remains Petitioners' position.

Finally, Respondents urge that the court of appeals did not *rule* on the question presented. But this is precisely what the court did: It held that the bankruptcy court had discretion to dismiss as untimely under Rule 60(b) Petitioners' request for a declaration that the Release and Injunction is unenforceable. (Pet. App. 4a.) That Petitioners sought a declaratory judgment is immaterial. Although courts generally have discretion not to hear declaratory judgment actions, the bankruptcy court erred because it based its ruling on the constitutionally impermissible application of the "reasonable time" limit to a due process challenge. Moreover, the court did not abstain from ruling; it affirmatively dismissed the case based both on the purported delay and the merits, precluding Petitioners from any further challenge, anywhere, to the enforceability of the Release and Injunction.

2. Not only is the question presented in the Petition squarely before this Court, but it reflects a mature circuit split.[5] (*See* Pet. 19-22.) Respondents deny that Second Circuit law conflicts with the

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[5] Several state courts examining federal law on this issue have explicitly noted this circuit split. *See Greenfield Hill Invs., LLC v. Miller*, No. W.C.1990-0830, 2005 WL 827017, at *5 (R.I. Super. Ct. Apr. 8, 2005); *McDaniel v. U.S. Fid. & Guar. Co.*, 478 S.E.2d 868, 871 (S.C. Ct. App. 1996).

majority view. (Opp. 21.) This argument ignores the plainly stated law of the circuit, that a 60(b)(4) motion must be made within a reasonable time. *See Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 191 (2d Cir. 2006)[6]; *Beller & Keller v. Tyler*, 120 F.3d 21, 24 (2d Cir. 1997). Although Second Circuit cases have stated that the requirement is "exceedingly lenient," *Beller & Keller*, 120 F.3d at 24, they have never held it inapplicable, and the Second Circuit has rejected voidness challenges as untimely. *See, e.g.*, *Abondolo v. Faraldi*, 234 F.3d 1261, 2000 WL 1721132, at *4 (2d Cir. 2000) (voidness challenge untimely after approximately two years). Indeed, it held *in this case* that Petitioners' request for relief was untimely after only seven months. District courts within the circuit routinely apply the "reasonable time" requirement. *See, e.g.*, *United States v. Brooks*, No. 00-CV-4131, 2007 WL 4441221, at *2 (E.D.N.Y. Dec. 17, 2007); *Tarascio v. United States*, 198 F.R.D. 321, 323 n.1 (D. Conn. 2000) (had motion been brought under 60(b)(4), "it would not have been timely [because] [t]hree years is not 'a reasonable time' in the context of Rule 60(b)"); *Presidential Life Ins. Co. v. Milken*, 946 F. Supp. 267, 277 (S.D.N.Y. 1996) (denying voidness motion "not made within the obligatory 'reasonable time'").

Respondents also mischaracterize the law of other minority circuits. The First Circuit has explicitly acknowledged a "temporal requirement" applicable to 60(b)(4) motions. *Farm Credit Bank of Baltimore v. Ferrera-Goitia*, 316 F.3d 62, 67 (1st Cir. 2003).

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[6] The *Grace* court's agreement with the district court's conclusion that the Rule 60(b)(4) motion was timely, 433 F.3d at 191, does not, as Respondents suggest, undermine Petitioners' argument that the Second Circuit follows the minority rule.

Relying on *Farm Credit*, district courts within that circuit apply the "reasonable time" requirement. (Pet. 21 n.9.) Likewise, the Eighth Circuit recently stated that the "reasonable time" limit applied to a voidness motion. *Baldwin v. Credit Based Asset Servicing & Securitization*, 516 F.3d 734, 737 (8th Cir. 2008). Courts within the Sixth Circuit routinely apply the "reasonable time" requirement. (Pet. 20.) *See United States v. Leprich*, 169 Fed. Appx. 926, 932 (6th Cir. 2006) (affirming denial of 60(b)(4) motion as time-barred); *United States v. Dailide*, 316 F.3d 611, 618 (6th Cir. 2003) (affirming denial of relief and holding 60(b)(4) attack on void judgment "is only cognizable if brought within a reasonable time"); *Daniel v. Trans Union Consumer Reporting Agency*, No. 01-CV-73552, 2008 WL 2245220, at *2 (E.D. Mich. May 30, 2008) (three-year delay unreasonable); *Brown v. Smith*, No. 97-CV-71827-DT, 2006 WL 3469608, at *1 (E.D. Mich. Nov. 20, 2006) (over seven-year delay unreasonable); *In re LWD, Inc.*, No. 5:06-CV-69-R, 2007 WL 1035149, at *6 (W.D. Ky. Mar. 30, 2006) (less than two-year delay unreasonable).

Taken together, the Petition and Opposition highlight the importance of resolving this circuit split. The minority rule subjects the enforcement of fundamental due process rights to a variety of equitable and discretionary considerations. By granting the Petition and accepting the majority rule, the Court would assure that the dramatic modifications of property rights that occur regularly in bankruptcy court would remain subject to the fundamental safeguard of due process of law.

3. Respondents urge the Court to reject this Petition based on a laundry list of purported "futility" arguments—reasons they contend Petitioners' claims

would fail, even if this Court were to decide in Petitioners' favor. These arguments are meritless. Not only does this case precisely frame an important issue on which the circuits are split, but a favorable decision would give Petitioners a genuine opportunity to pursue their claims.

Respondents first argue that Petitioners' challenge to the enforceability of the Release and Injunction would have been barred by *res judicata*, the equitable mootness doctrine, and the 180-day time limit applicable to revocation under Section 1144 of the Bankruptcy Code. (Opp. 13.) However, no court has ever determined that any of these arguments bars Petitioners' claims. Respondents' untested contentions are not an appropriate basis to reject the Petition.[7]

Respondents also assert that Petitioners' "failure" to raise Rule 60(b)(4) below waives their ability to rely on that rule. (Opp. 27.) This is the same circular argument they make throughout their Opposition. Petitioners do not seek to "rely on" Rule 60(b)(4) and have not waived their arguments.[8]

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[7] Moreover, each of the arguments is substantively flawed. The *res judicata* principle of *Stoll v. Gottlieb* is limited to a court's determination of its own *jurisdiction*, where jurisdiction was a *contested issue*. 305 U.S. 165, 172, 177 (1938). *Stoll* does not support the proposition that *res judicata* precludes notice-based challenges to confirmation orders. Likewise, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005), did not apply equitable mootness to a due process challenge and does not support enforcement of a void order under that doctrine. Lastly, Section 1144 applies only to requests to revoke a plan based on fraud, not to claims that the plan is void. *See In re Rideout*, 86 B.R. 523, 530 (Bankr. N.D. Ohio 1988).

[8] Moreover, a number of courts adopting the majority position hold that relief from a void order is mandatory, even where the party seeking relief failed to raise the voidness issue below. *See,*

Respondents next argue that Supreme Court review would serve no purpose because the bankruptcy and district courts found that Petitioners' complaint failed to state a claim that Petitioners were known creditors. (Opp. 28.) Petitioners believe these rulings erroneously looked beyond the pleadings on a Rule 12(b)(6) motion and ignored well-pled allegations that the Debtors and Respondents knew of their claims. The court of appeals, however, never addressed the merits arguments, affirming based solely on timeliness. (Pet. App. 3a.) Thus, this Court's review will not be futile. If the Court reverses, the court of appeals will need to rule on the merits of the Rule 12(b)(6) dismissal, potentially allowing the case to go forward.

Nor is there any basis for Respondents' contention that Petitioners' claims are barred by the statute of limitations or equitable estoppel. (Opp. 29.) No evidence in the record indicates that the limitations periods for *any* of Petitioners' claims have run. Moreover, most states have statutory tolling provisions providing that an injunction preventing prosecution of an action suspends the statute of limitations. *E.g.*, 735 ILL. COMP. STAT. 5/13-216 (2007); NY C.P.L.R. § 204 (McKinney 2008). Even where there is no statute, the limitations period is equitably tolled. *See*

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e.g., *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994). Respondents' reliance on *Page v. Schweiker*, 786 F.2d 150 (3d Cir. 1986), is misplaced. Although the voidness issue there was not before the court because it had not been raised below, the Third Circuit acknowledged that the failure to raise this issue below did not waive it: "even now the Secretary may not be foreclosed from litigating this issue in the district court in the first instance." 786 F.2d at 153.

In re Parmalat Sec. Litig., 493 F. Supp. 2d 723, 731-32 (S.D.N.Y. 2007).

Respondents also argue that Petitioners' claims are futile because, even if the Release and Injunction were declared void, it is "inconceivable" that the bankruptcy court would allow Petitioners a remedy. (Opp. 29, 32.) This argument is senseless because Petitioners are not seeking any remedy from the bankruptcy court other than a declaration that the Release and Injunction is void and unenforceable against them. If the bankruptcy court grants this declaration, there is no further remedy for it to withhold based on equity. Moreover, if an order is void, relief is mandatory.[9] *See V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 n.8 (10th Cir. 1979). None of Respondents' cases would give the bankruptcy court discretion to find the Release and Injunction unenforceable and then require petitioners to comply with it.[10]

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[9] As noted in the Petition, the bankruptcy court may have discretion to determine how to address the remainder of the Release and Injunction, *i.e.*, whether to revoke or vacate the entire plan or merely to declare that the Release and Injunction is unenforceable as to Petitioners. (Pet. 15 n.7.) This does not mean the court could hold a void order enforceable. In any event, Petitioners have not sought revocation.

[10] *United States v. One Toshiba Color Television*, 213 F.3d 147 (3d Cir. 2000), did not hold that a void judgment could be enforced because of laches. Rather, it held that the judgment was void but that laches might still be an issue in a subsequent proceeding to obtain affirmative relief. *In re Center Wholesale, Inc.*, 759 F.2d 1440 (9th Cir. 1985), did not order enforcement of a void order. It suggested a remedy available to a secured creditor whose interests had been inadequately protected. *In re C.S.T. Constr. Co.*, 21 B.R. 840 (Bankr. N.D. Ill. 1982), involved creditors (with actual knowledge of the bankruptcy) who sought to file a late proof of claim. *In re Columbia Ribbon & Carbon*

Furthermore, the equities are far from as one-sided as Respondents suggest. (Opp. 31-32.) As an initial matter, Respondents are not the blameless parties that they suggest themselves to be. Respondents are alleged to have misappropriated Petitioners' photographs and published them in catalogs and on the internet in violation of Petitioners' copyrights. Respondents are further alleged to have been aware of Petitioners' potential claims and now seek to evade liability. Respondents therefore lack any legitimate basis to argue that Petitioners should be foreclosed from recovery because they "failed" to pursue claims against the Debtors. Indeed, Respondents argue out of both sides of their mouths when they suggest that Petitioners "propose to disrupt a confirmed and largely consummated plan" (Opp. 34), then fault Petitioners for not having "sought to file late claims against the Debtor" under the same consummated plan. (*Id.* 32).

Finally, Respondents raise the specter of "prejudicing the many other parties affected by and who acted in reliance on the Plan." (Opp. 34.) This is not, under any circumstances, a basis to enforce an order against parties who were not afforded minimum due process. But, in this case, the concern is particularly misplaced. The only relief that Petitioners seek is a declaration that the Release and Injunction is unenforceable against them. Petitioners do not ask to revoke or undo the plan or to obtain relief against any party other than Respondents. And because Respondents are alleged to have known of Petitioners' claims, Respondents will not be surprised or prejudiced by their inability to enforce the Release

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Mfg. Co., 54 B.R. 714 (Bankr. S.D.N.Y. 1985), likewise involved late claims rather than a voidness challenge.

and Injunction against aggrieved parties who never received constitutionally sufficient notice.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July 30, 2008

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11
Case No. 03-11540 (BRL)
(Jointly Administered)
Adv. Pro. No. 06-1554
Case No. 1:06-cv-09385-NRB

In re: SPIEGEL, INC., *et al.*,
Debtors.

BICO STUPAKOFF and RUSSELL JAMES,
Appellants,

v.

OTTO (GMBH & CO KG), OTTO DOOSAN LTD. AND OTTO SUMISHO INC.,
Appellees.

REPLY BRIEF OF APPELLANTS BICO STUPAKOFF AND RUSSELL JAMES

ON APPEAL FROM AN ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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January 8, 2007

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ARGUMENT

In their opening Appellees' Brief (hereinafter cited as "Appellees' Brief"), the Otto Entities[1] urge two fundamental points: (i) the relief requested by the Appellant Photographers supposedly amounts to an impermissible collateral attack on the Spiegel plan and confirmation order and (ii) the Photographers supposedly failed to adequately plead that they were known creditors entitled to actual notice. *See generally* Appellees' Brief. These contentions reflect a profound misunderstanding of the nature of the due process challenge made by the Photographers, as well as of the specific facts alleged in their Complaint.

The Photographers assert that, because they did not receive constitutionally sufficient notice of the Release and Injunction, these plan provisions are unenforceable against them. R-10, ¶¶1, 66.[2] Simply stated, the constitutional violation rendered these provisions a nullity with respect to the Photographers. It thus makes no sense to characterize the Photographers' position as a collateral attack on the plan and confirmation order. Why would the Photographers need to modify or vacate an order that has no force or effect against them? The limitations on plan modification codified at 11 U.S.C. § 1127(b) therefore have no bearing whatsoever on the Photographers'

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[1] Defined terms not otherwise defined herein shall have the meanings ascribed to them in Photographers' opening brief.

[2] Citations to the record shall reference the items listed in the Record on Appeal attached to the Photographers' opening brief as Appendix I, and shall follow the convention "R-__"). The Otto Entities have used a slightly different numbering convention in their Appellees' Brief. To avoid confusion, the Photographers will continue to cite to the numbering convention set forth in Appendix I to their opening brief.

entitlement to relief. Likewise, Fed. R. Civ. P. 60(b) is either irrelevant to the requested relief, or consistent with such relief.

The Otto Entities likewise miss the mark in their challenge to the sufficiency of the facts pled in the Complaint. The Photographers properly alleged that they were known creditors of both Spiegel and the Otto Entities, and were therefore entitled to actual notice of the relief sought against them via the Release and Injunction. These well pled facts were required to be accepted as true for purposes of resolving the Otto Entities' motion to dismiss, and should have compelled denial of the motion. By treating these facts as conclusions of law that need not be credited as true, the Otto Entities ignore or misstate the applicable authorities, as well as the facts actually alleged in the Complaint.

In short, the Photographers properly stated a claim for declaratory relief based upon a substantial violation of their constitutional rights. The Bankruptcy Court erred in summarily dismissing that claim, based upon the purported legal conclusion that the Photographers were unknown creditors. None of the arguments or record citations contained in the Appellees' Brief can excuse or justify the Bankruptcy Court's error. To the contrary, this brief represents a continuation of the Otto Entities' practice of seeking to adjudicate and extinguish substantial, fact-intensive claims in summary fashion. The Order should be reversed, and the Otto Entities ordered to answer the Complaint within ten days of such reversal.

I. THE DISMISSAL OF THE PHOTOGRAPHERS' COMPLAINT SHOULD BE REVIEWED *DE NOVO*.

As a preliminary matter, the Photographers need to clear up some confusion created by the Otto Entities' statement of the applicable standard of appellate review. *See* Appellees' Brief at 3. By including their own statement of the standard, the Otto Entities signified "dissatisfaction" with the Photographers' statement. *See* Fed. R. Bankr. P. 8010(a)(2)("a statement of the basis of appellate jurisdiction need not be made unless the appellee is dissatisfied with the statement of the appellant"). The Otto Entities assert in their statement that "[a] review of the determination not to invoke the Declaratory Judgment Act is subject to an abuse of discretion standard." *See* Appellees' Brief at 3, *citing Wilton v. Seven Falls Co.*, 515 U.S. 277, 288-90 (1995). In so stating, the Otto Entities evidently urge this Court to review Judge Lifland's order based upon an abuse of discretion standard. That position is wholly without merit.

Concededly, as held by the Supreme Court in *Wilton*, a decision whether to invoke the Declaratory Judgment Act is reviewed for an abuse of discretion. But that citation is wholly inapplicable to this case, where Judge Lifland never made a determination as to whether the Declaratory Judgment Act should be invoked. *See generally* R-28. To the contrary, Judge Lifland reached the merits of the Photographers' constitutional claims, and effectively entered declaratory relief adverse to that sought in the Complaint. R-28 at 9-13. This case thus bears no resemblance to *Wilton*, wherein the District Court entered an order staying a declaratory judgment action involving insurance coverage, so that a parallel state proceeding could go forward. *See Wilton*, 515 U.S. at 279-81.

Judge Lifland did not dismiss the Adversary Proceeding, so that a parallel state case could go forward. Rather, he purported to decide the ultimate constitutional issue. R-28 at 9-13.

The Supreme Court's decision in *Wilton* is more circumscribed in its scope than the Otto Entities suggest:

> . . . district courts' decisions about the propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief, should be reviewed for abuse of discretion. **We do not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example cases raising issues of federal law or cases in which there are no parallel state proceedings.**

Wilton, 515 U.S. at 289-90 (emphasis added). By its own terms, the *Wilton* decision appears to rest on both the propriety of declaratory relief, as well as the presence of the parallel state proceeding.

Likewise, while not yet having reached the issue directly, the Second Circuit has expressed the view that *Wilton* does not compel an abuse of discretion standard of review for a declaratory judgment action decided on grounds other than the trial court's decision to invoke declaratory relief. *See Jenkins v. United States*, 386 F.3d 415, 417 (2d Cir. 2004) (suggesting that *de novo* review may be appropriate where a declaratory judgment action is dismissed for lack of standing); *E.R. Squibb & Sons, Inc. v. Lloyd's & Companies et al.*, 241 F.3d 154, 177 (2d Cir. 2001)("[t]he fact that the high level excess insurers challenge the district court's subject matter jurisdiction to hear this action rather than its discre-

tionary decision to exercise jurisdiction under the Declaratory Judgment Act would seem to suggest that *de novo* review is appropriate").

The foregoing authorities can readily be harmonized with the statement of the standard of review set forth in the Photographers' opening brief—in the Second Circuit, the Bankruptcy Court's granting of a motion to dismiss is reviewed *de novo*. Brief of Appellants Bico Stupakoff and Russell James (hereinafter, "App. Brief"), 1, *citing Conboy v. AT&T Corp.*, 241 F.3d 242, 246 (2d Cir. 2001). Where a trial court purports to decide the ultimate constitutional issue in the case, with no other lower court having the opportunity to pass on such issue, it makes perfect sense that review of that decision would be *de novo*. Where, by contrast, a trial court dismisses or stays a declaratory action, so that a parallel state proceeding may go forward, the *Wilton* decision makes clear that appellate review should recognize the trial court's considerable discretion on this issue. Judge Lifland's Order was not a discretionary decision as to which court or tribunal should resolve the Photographers' constitutional claims. Rather, this Order was a far reaching and incorrect resolution of the ultimate constitutional question. As such, this Order is subject to *de novo* review. The Otto Entities' assertion to the contrary (Appellees' Brief at 3) is simply wrong.

II. THE PHOTOGRAPHERS PROPERLY SOUGHT DECLARATORY RELIEF AS TO THE ENFORCEABILITY OF THE RELEASE AND INJUNCTION, RATHER THAN SEEKING TO MODIFY OR VACATE THESE PROVISIONS.

The Otto Entities devote the lion's share of their Appellees' Brief to the arguments that (i) the Photo-

graphers can only obtain relief by modifying or vacating the Spiegel plan and (ii) the Photographers fail to satisfy the prerequisites for modification or vacatur of the plan and confirmation order, as set forth in 11 U.S.C. § 1127(b) and Fed. R. Civ. P. 60(b). *See* Appellees' Brief at 12-29. In so arguing, the Otto Entities do battle with the proverbial straw men. The Photographers have not predicated their Complaint upon modification or vacatur of the Release and Injunction, and need not have done so. *See generally* R-10. Rather, consistent with applicable precedent, the Photographers have sought declaratory relief as to the consequences of failure to provide them with constitutionally sufficient notice of the entry of the Release and Injunction. In light of that precedent, the Bankruptcy Court committed reversible error in deeming the Complaint to be an untimely and improper collateral attack on the Plan. R-28 at 9- 13.

A. The Photographers Did Not Concede the Applicability of Rule 60(b).

At the outset, the Photographers must correct a significant liberty taken with the record by the Otto Entities. The Otto Entities claim that "as found by the Bankruptcy Court, the Photographers effectively conceded that Rule 60(b) governed the Adversary Complaint when the Photographers relied upon Rule 60(b) as the basis for their Plan Modification Motion." Appellees' Brief at 15. The record clearly discloses the falsity of this claim. The Photographers made no such concession, and actually took care to clarify this issue during oral argument on the Motion to Dismiss and Plan Modification Motion:

> **Your Honor, it [sic] appears to suggest** that because we brought **our motion to modify the plan injunction under Rule 60 that some-**

> **how operates as an admission or a concession that Rule 60 is also the operative authority for the relief requested in the adversary proceeding. We would like to, respectfully suggest that is in [sic] the case.** The reason, Your Honor, is that the adversary proceeding hinges on a due process argument. It's our contention–when Mr. Lipkin presents his motion, we will be happy to make further arguments—that the declaratory action is an appropriate vehicle for resolution of those due process issues; that those issues can appropriately be raised without attacking or vacating the underlying Order; and that the relief we seek in the adversary proceeding is precisely tailored to determine whether or not these provisions can be enforceable against these specific parties in light of the due process arguments we make.
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> Now, by contrast, Your Honor, **the motion to modify the Plan injunction assumes without conceding that there is an operative injunction, that therefore it is appropriate and not at all inconsistent with the relief we seek in the adversary to seek to modify that injunction** on the same standard that a party would seek to modify a permanent injunction, which is essentially a balancing of the hardships and the prejudice and integral [sic] of the purposes for which the permanent injunction was put in place and the nature of relief sought.

R-27, 6-8 (emphasis added).

Under no stretch of the imagination can the Photographers be said to have "conceded" that Rule 60 governs their entitlement to the relief requested in their Complaint. To the contrary, the Photographers

took great pains to outline the different procedural bases of the two motions, and to make clear that they were entitled to relief without vacating the underlying confirmation order. While Judge Lifland did decide that Rule 60 governed the Motion to Dismiss (R-28, 12), he certainly did not make a finding that the Photographers waived or conceded this point. *See generally* R-28.[3] In arguing for such a waiver, the Otto Entities do not fairly or correctly represent the record.

B. The Due Process Violations Pled by the Photographers Render the Release and Injunction Unenforceable against them, Thereby Eliminating any Need to Modify or Vacate These Provisions.

The thrust of the Otto Entities' argument is that the Photographers have launched a collateral attack on the Spiegel Plan. *See* Appellees' Brief at 12-29. Judge Lifland certainly based much of his ruling on this premise. *See, e.g.*, R-28 at 12 ("[e]ssentially, this Complaint is a collateral attack on a Plan and Confirmation Order that were approved by this Court over a year ago"). However, because the Photographers have pled that they did not receive constitutionally sufficient notice of the Release and Injunction, they have no need to modify or vacate the Spiegel Plan and confirmation order. The decisional authorities overwhelmingly confirm that, under these circumstances, the offending plan provisions cannot be enforced against the Photographers. *See DePippo*

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[3] Judge Lifland's statement that "there is an internal inconsistency on the part of the parties with respect to reliance of the vehicle to be used to determine each motion" is not to the contrary. R-27, 4.

v. Kmart Corp. et al., 335 B.R. 290, 295 (S.D.N.Y. 2005)("**[w]here notice satisfies due process,** an order confirming a reorganization plan operates to discharge all unsecured debts and liabilities, even those of tort victims who were unaware of the debtor's bankruptcy")(emphasis added; internal citations and quotations omitted); *In re U.S.H. Corp. of New York*, 223 B.R. 654, 658 (S.D.N.Y. 1998)(Lifland, J.)(". . . if a creditor is not given notice of the bankruptcy proceeding and the relevant bar dates, its claims cannot be constitutionally discharged"); *see also In re Deutchman*, 192 F.3d 457, 461 (4th Cir. 1999)(payments under Chapter 13 plan would not extinguish IRS liens, owing to failure to give IRS sufficient notice); *In re Linkous*, 990 F.2d 160, 162 (4th Cir. 1993)(confirmation order cannot be given *res judicata* effect if it would result in a violation of secured creditor's due process rights); *Reliable Electric Co., Inc. v. Olson Construction Co.*, 726 F.2d 620, 622-23 (10th Cir. 1984)(claim cannot be discharged pursuant to confirmation order where lack of reasonable notice of confirmation hearing violates Fifth Amendment); *In re Newstar Energy of Texas, LLC,* 280 B.R. 623, 626-27 (Bankr. W.D. Mich. 2002) (if a creditor does not receive adequate notice, that creditor is not bound by the confirmation order); *In re Rideout*, 86 B.R. 523, 528-29 (Bankr. N.D. Ohio 1988) (if confirmation order were not vacated, lack of adequate notice would prevent claim from being discharged thereunder). It necessarily follows that 11 U.S.C. § 1127 and Fed. R. Civ. P. 60(b) are facially inapplicable. If the Photographers prevail on their constitutional claim, then the Release and Injunction are necessarily unenforceable against them.

The authorities cited by the Otto Entities simply fail to meet this critical point. *See, e.g., In re Vencor,*

284 B.R. 79, 82-85 (Bankr. D. Del. 2002), *cited in* Appellees' Brief at 20. The Otto Entities assert that the Photographers are "similar" to the creditors in *Vencor*, who unsuccessfully sought to strike the release provisions from a confirmation order. Appellees' Brief at 20. But the creditors in *Vencor* did not make a constitutional challenge to the plan, and the bankruptcy court ascribed no credibility to their lack of notice argument. *See Vencor*, 284 B.R. at 81-86. Instead, the *Vencor* creditors premised their challenge to the plan releases upon their assertions that the confirmation order was procured by fraud, and entered *outside the bankruptcy court's jurisdiction. Id.* The *Vencor* case therefore has no bearing on this case, and certainly does not support the conclusion that the Photographers are obliged to proceed by modifying or vacating the plan and confirmation order. By framing this dispute as a post-confirmation plan modification, the Otto Entities continue to battle straw men, and to fail to address the actual constitutional claims pled in the Complaint.

C. It Is Wholly Proper to Adjudicate Constitutional Violations through the Use of a Declaratory Judgment Action.

As the Otto Entities would have it, a declaratory judgment action "remain[s] subject to section 1127(b), which governs plan amendments, and Rule 60(b), which governs obtaining relief from a final confirmation order in a bankruptcy case." Appellees' Brief at 13. The Otto Entities seem to be arguing that the Photographers cannot obtain declaratory relief on their constitutional claims, without also requesting permission to modify or vacate the plan and confirmation order. The Otto Entities offer no authority for this remarkable assertion, other than *In re G-I*

Holdings, Inc., 328 B.R. 691, 693 (D.N.J. 2005), *cited in* Appellees' Brief at 13. The Otto Entities cite *G-I Holdings* for the proposition that "Plaintiffs may not seek relief under the Declaratory Judgment Act because Congress has enacted a statute that provides for the specific relief requested." *G-I Holdings*, 328 B.R. at 694, *cited in* Appellees' Brief at 13. However, the Otto Entities fail to apprise this Court that the statute precluding declaratory relief in the *G-I Holdings* case was 11 U.S.C. § 524(g)—the statute implementing a channeling injunction for asbestos claims. *See G-I Holdings*, 328 B.R. at 694-99. Nothing in this case suggests that 11 U.S. C. § 1127 or Fed. R. Civ. P. 60(b) is applicable to the Photographers' constitutional claims, and it is misleading for the Otto Entities to suggest otherwise.

There is ample precedent for the Photographers to challenge the enforceability of the Release and Injunction on constitutional grounds, without being simultaneously required to seek relief under 11 U.S.C. § 1127 and/or Fed. R. Civ. P. 60(b). *See Deutchman*, 192 F.3d at 459-61 (Debtor brings declaratory judgment action to determine whether IRS liens will be extinguished under Chapter 13 plan; Fourth Circuit addresses constitutional issues in affirming declaration that liens were not extinguished); *Reliable Electric*, 726 F.2d at 621-23 (Tenth Circuit evaluates bankruptcy court's grant of declaratory relief as to whether claim is discharged in light of inadequate notice to creditor); *Newstar Energy*, 280 B.R. at 626-27 (creditor brings declaratory action to determine whether it is bound by terms of con-firmed plan, given failure to afford such creditor adequate notice); *U.S.H. Corp.*, 223 B.R. at 656-60 (Lifland, J.)(group of homeowners sues for declaration that

they are not bound by terms of confirmed plan).[4] In all of these cases, the parties litigated the issue of whether plan terms could be enforced against a party alleged to have received constitutionally insufficient notice. None of these cases imposed the additional hurdles of compliance with 11 U.S.C. § 1127(b) or Fed. R. Civ. P. 60(b).

The Photographers do acknowledge that there have been instances where parties raising due process objections to a confirmed plan have also sought modification or vacatur of such plan and confirmation order. *See, e.g., Linkous*, 990 F.2d at 161-63; *Rideout*, 86 B.R. at 524-31. However, nothing in these authorities compels the conclusion that a party who did not receive constitutionally sufficient notice of a confirmed plan **must seek to** modify or vacate that plan to protect its rights. For example, in *Linkous*, Piedmont Trust Bank made a Motion to Revoke Order Confirming Plan and Dismiss or Convert Case based, among other grounds, on the insufficiency of notice to the Bank. *Linkous*, 990 F.2d at 161. The bankruptcy court initially dismissed the motions, ruling that the Bank "had failed to protect its interests

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[4] In the *U.S.H.* case, Judge Lifland ultimately dismissed the complaint for failure to state a claim, based upon his conclusion that the Plaintiffs were unknown creditors who were not entitled to receive actual notice of the plan. As will be explained further below, the Photographers respectfully disagree with Judge Lifland's reasoning in the *U.S.H.* decision on a number of points. The Photographers cite the decision here for the limited purpose of showing that in *U.S.H.* Judge Lifland addressed the merits of a constitutional claim through the procedural framework of a declaratory judgment action, without treating the case as a collateral attack on the plan, or otherwise requiring compliance with 11 U.S.C. § 1127 or Fed. R. Civ. P. 60(b). *See generally U.S.H.*

and was too late to challenge successfully confirmation." *Id.* Without addressing the timeliness or procedural propriety of the Bank's motions, the Fourth Circuit ultimately held that due process violations rendered the confirmation order unenforceable as to the Bank, and vacated such order as it pertained to the Bank. *Id.* at 163.

In reaching this decision, the Fourth Circuit explained how constitutional concerns trump the usual finality of a confirmation order:

> . . . a bankruptcy court confirmation order generally is treated as *res judicata*. However, we cannot defer to such an order on *res judicata* grounds if it would result in a denial of due process in violation of the Fifth Amendment of the United States Constitution.

Id. at 162. The Linkous decision demonstrates that a party can obtain declaratory relief as to whether it is bound by a confirmation order without satisfying the prerequisites of 11 U.S.C. § 1127(b) or Fed. R. Civ. P. 60(b).

The *Rideout* decision reaches a similar result via a different analytical path. The Hahns—creditors in that case—filed a motion to vacate the confirmation order, based upon the lack of notice to them of the confirmation hearing. *Rideout*, 86 B.R. at 525. The Debtors opposed the motion, arguing, *inter alia*, that a court cannot vacate a confirmation order absent compliance with 11 U.S.C. § 1144. *Id.* at 526. The Bankruptcy Court ultimately held that (i) the Hahns had not received constitutionally sufficient notice of confirmation and (ii) the proper remedy for such violation was to vacate the confirmation order. *Id.* at 531. The Bankruptcy Court justified vacatur under

both 11 U.S.C. § 105 and Fed. R. Civ. P. 60(b)(4). However, the Bankruptcy Court expressly noted that, were the confirmation order not vacated, the confirmation order would still be unenforceable against the Hahns:

> [a]s a preliminary matter, the Court must confess some puzzlement at the position asserted by Debtors' Counsel. Vacating the "Order Confirming Plan" may be a somewhat unusual approach to the problem presented in this case. However, from the Debtors' perspective, the usual solution appears to be undesirable. **If the Court cannot vacate its Order, the lack of adequate notice would result in the Hahns' claim not being bound by the Plan, and therefore the obligation would not be discharged.** As a practical matter, it is difficult to understand why the Debtors feel that a defective Plan, which would be ineffective, is preferable to simply vacating the Court's Order . . . .

Id. at 528-29 (bold emphasis added; italics in original).

The *Linkous* and *Rideout* decisions can readily be harmonized with the other authorities cited by the Photographers. All of these cases support the proposition that, where constitutionally sufficient notice of plan confirmation is not provided, the confirmed plan cannot be enforced against the parties receiving insufficient notice. While the aggrieved parties have a number of procedural options available to them in this situation, it is wholly proper for such parties to proceed by way of declaratory judgment action. It is also proper, in the context of such an action, for these parties to seek a declaration confirming (i) the constitutional violation and (ii) the resulting lack of

enforceability of the confirmed plan as against such parties. While plan modification or vacatur are potential remedies, they are neither exclusive nor mandatory. And, in the context of a confirmed, substantially consummated plan, the more narrowly tailored remedy sought by the Photographers seems the better outcome for all parties.

The Photographers' position on this issue finds further support in the Second Circuit's decision in *Whelton v. Educational Credit Management Corp.*, 432 F.3d 150 (2d Cir. 2005). In *Whelton*, a student loan creditor filed an adversary proceeding to declare a consolidated student loan nondischargeable. *Whelton*, 432 F.3d at 152. The bankruptcy court ruled that (i) the student loan discharge provisions contained in the plan were outside the scope of relief available under Chapter 13 and (ii) the failure to provide the creditor with "proper notice of the Debtor's intent to discharge the student loan . . . constituted an abrogation of [the creditor's] due process rights." *Id.* at 152-53. Because it found the plan's "discharge by declaration" provisions to be void, the Second Circuit declined to reach the due process issue pled by the creditor. *Id.* at 154, n. 1. However, the Second Circuit expressly found that the insufficiency of notice to the creditor precluded the Debtor from asserting that the terms of the confirmed plan were *res judicata*:

> . . . we reject *Whelton*'s argument that the Bankruptcy Court approval of his Plan serves to preclude challenges such as ECMC's. It is true that the Bankruptcy Code provides that "the provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has

> accepted, or has rejected the plan." 11 U.S.C. § 1327(a). As the Ninth Circuit has held, however, although confirmed plans are *res judicata* to issues therein, the confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding, or were not sufficiently evidenced in a plan to provide adequate notice to the creditor.

Id. at 154 (internal quotation and citation omitted).

The Second Circuit makes clear, in *Whelton*, that (i) a creditor may properly challenge the enforceability of a plan provision by means of adversary proceeding, (ii) such challenge need not take place under the auspices of 11 U.S.C. § 1127(b) or Fed. R. Civ. P. 60(b) and (iii) the bankruptcy court may properly evaluate the sufficiency of the notice afforded to such creditor in the context of that adversary proceeding. In short, while not specifically reaching the due process issue, the *Whelton* decision confirms, beyond a shadow of a doubt, the procedural propriety of the Photographers' adversary proceeding.

The Otto Entities attempt to distinguish *Whelton* by asserting that (i) the relief sought in *Whelton* "still was a collateral attack on the confirmation order" (*citing Whelton*, 432 F.3d at 153) and (ii) "[h]ence, Rule 60(b), including the time limitation of Rule 60(b), still governed that complaint" *(citing Whelton*, 432 F.3d at 156, n.2). Appellees' Brief at 14-15. The second part of this formulation is an overstatement of the Second Circuit's decision. The first part of this formulation is a misreading so profound as to call into question how it could have been made.

The Second Circuit in no way labeled the creditor's adversary proceeding as a collateral attack on the

plan. *See generally Whelton*. The Otto Entities appear to have lifted this "collateral attack" language out of a portion of the opinion describing a split in the circuits, and summarizing the view of **other** circuits. *See Whelton,* 432 F.3d at 153-54. Worse still, this language summarizes the rule adopted in the Ninth and Tenth Circuits—**a view rejected by the Second Circuit in the *Whelton* case!** *Id.*[5] Thus,

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[5] The relevant passage from *Whelton* follows, with the language represented by the Otto Entities to be Second Circuit authority highlighted in bold:

> [o]ur sister circuits have split in ruling on the validity of student loan discharges obtained by declaration. The Ninth and Tenth Circuits have acknowledged that such a discharge procedure vio-lates the Bankruptcy Code and Rules; nevertheless, these courts have upheld such discharges where a student loan creditor had notice of the declaration's placement in the plan and failed to object. *See, e.g., Great Lakes Higher Educ. v. Pardee (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999); *Anderson v. UNIPAC-NEBHELP (In re Anderson)*, 179 F.3d 1253 (10th Cir. 1999). In the view of these courts, the creditor's failure to object to a plan or to appeal its confirmation "constitutes a waiver of [its] right to collaterally attack the confirmed plan postconfirmation on the basis that the plan contains a provision contrary to the Code." *In re Pardee*, 193 F.3d at 1085 (internal quotation marks omitted); *accord In re Anderson*, 179 F.3d at 1257-58 (holding that creditor's failure to object or appeal from confirmation of debtor's chapter 13 plan precludes subsequent attack; the plan confirmation is final and constitutes *res judicata* as to all creditors, including those holding student loans).

Whelton, 432 F.3d at 153-54 (emphasis added). The Second Circuit goes on to reject this approach, and to adopt the rule followed by the Fourth, Sixth and Seventh Circuits. *Id.* at 154. The Second Circuit further notes that "the Tenth Circuit and a bankruptcy appellate panel of the Ninth Circuit have apparently retreated somewhat from their former contrary view. *Id.* at 154.

the Otto Entities have cited, as binding Second Circuit precedent, a line from *Whelton* summarizing and rejecting authority from other circuits. To put it mildly, this citation badly misrepresents the *Whelton* case, and in no way supports the untenable assertion that the Second Circuit views adversary proceedings like this case as "collateral attacks" on a plan.

The second part of the Otto Entities' formulation—that the complaint in *Whelton* was governed by Rule 60(b) and the time limitation set forth therein—overstates, and in so doing, misstates the actual language of the Second Circuit's opinion. The actual language is as follows:

> *Whelton* also argues that ECMC's challenge to the discharge was untimely. He notes that the Bankruptcy Code permits revocation of a confirmation order only if the request is made within 180 days of entry of the order, whereas the present action was filed more than two years after confirmation. This action is not, however, an action to revoke a confirmation order, but rather to declare one of the provisions of a confirmed plan void *ab initio*. Accordingly, ECMC was bound only by the "reasonable time" limitations of Rule 60(b)(4), which have been interpreted permissively. *See Beller & Keller v. Tyler*, 120 F.3d 21, 24 (2d. Cir. 1997)("[I]t has been oft-stated that, for all intents and purposes, a motion to vacate a default judgment as void may be made at any time.")(internal quotations omitted).

Id. at 156, n.2.

Viewed in its full context, this language does not suggest that ECMC's challenge was subject to Rule

60, or that this creditor was not entitled to proceed by an adversary proceeding seeking declaratory relief. Indeed, the Second Circuit ultimately affirmed the declaratory judgment entered in ECMC's favor by the bankruptcy court. *Id.* at 152-53, 156. And while the Second Circuit concededly did apply the "reasonable time" limitation codified at Fed. R. Civ. P. 60(b)(4), it did so based upon the fact that ECMC sought to declare a confirmed plan provision void *ab initio*. The Photographers, by contrast, solely seek to declare the Release and Injunction unenforceable against those parties that did not receive constitutionally sufficient notice of these provisions. Finally, the Second Circuit held that the "reasonable time" limitation provided in Rule 60(b)(4) was to be "interpreted permissively." Applying this standard, the Second Circuit found that ECMC's adversary proceeding had been brought timely, even though the complaint was filed over two years after plan confirmation. The Photographers filed their adversary complaint within thirteen months of confirmation—almost twice as quickly as the complaint deemed to be timely filed in *Whelton*.

Simply put, the binding authority of the *Whelton* decision drives a stake through the heart of the supposed procedural deficiencies identified in the Appellees' Brief. The Otto Entities fail to distinguish or minimize the impact of this case in any persuasive way. Taken together with the other authorities cited herein, the *Whelton* decision demonstrates that the Photographers properly proceeded by way of adversary proceeding, and were in no way required to comply with the provisions of 11 U.S.C. § 1127 and Fed. R. Civ. P. 60(b). And, even assuming without conceding that the time limitations set forth in Rule 60(b)(4) are applicable to this case, the *Whelton* decision confirms beyond a shadow of a doubt that (i)

these limitations are to be read "permissively," and (ii) the Photographers filed their Complaint well within the parameters of reasonable timeliness identified by the Second Circuit.

III. THE WELL PLED ALLEGATIONS OF THE PHOTOGRAPHERS' COMPLAINT WERE MORE THAN SUFFICIENT TO SURVIVE DISMISSAL OF THE CASE.

The Photographers properly pled that they were known creditors entitled to actual notice of the Release and Injunction, and that they never received such notice. R-10, ¶¶ 12, 16, 24-26, 31, 34, 63-66. Those well pled allegations should have been more than sufficient to withstand dismissal of the Photographers' underlying constitutional claim. Judge Lifland nevertheless dismissed their Complaint, ruling *inter alia*, that (i) the allegation that they were known creditors was a legal conclusion, which "need not be considered in a light favorable to the Plaintiffs" and (ii) the Photographers did not allege their status as known creditors with sufficient specificity. R-28 at 10-11. The Otto Entities adopt these points in the final section of their brief. *See* Appellees' Brief at 29-39.

In reaching this conclusion, Judge Lifland committed reversible error in two distinct respects. First, he incorrectly characterized as a legal conclusion the Photographers' well pled allegations that they were known creditors. These allegations were classic statements of fact, and entitled to be taken as true for purposes of the Motion to Dismiss. Second, he failed to apply the liberal notice pleading rule codified at

Fed. R. Civ. P. 8(a),[6] instead substituting an apparent fact pleading standard without reason or basis in law. Viewed under the proper legal standards, the Motion to Dismiss should have been denied.

A. The Photographers' Allegation that They Were Known Creditors Presented a Classic Question of Fact.

Contrary to Judge Lifland's ruling, the Photographers' allegation that they were known creditors presents a fact question. *See Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 491 (1988); *Armstrong v. Armstrong*, 130 F.R.D. 449, 452-53 (D. Colo. 1990); *In re Medical Technology, Inc.*, 2006 WL 2519530, at * 10 (Bankr. N.D. Tex. June 26, 2006)(available on Westlaw and attached hereto as Exhibit A); *In re Gencor Industries, Inc.*, 298 B.R. 902, 916-17 (Bankr. M.D. Fla. 2003). In *Tulsa Professional*, the Supreme Court noted that the appellant's status as a known or reasonably ascertainable creditor "cannot be answered on this record," and remanded for a determination on the issue. *Tulsa Professional*, 485 U.S. at 491. Similarly, the district court in *Armstrong* found material factual disputes as to whether certain claimants against the decedent's estate were known or reasonably ascertainable creditors entitled to actual notice. *Armstrong*, 130 F.R.D. at 452-53; *see also Medical Technology*, 2006 WL 2519530, at *10 ("the Court makes no findings as to whether any specific Creditor constitutes an unknown or known Creditor which must be determined on a case-by-case basis").

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[6] Fed. R. Civ. P. 8(a) is made applicable to this adversary proceeding pursuant to Fed. R. Bankr. P. 7008.

The Bankruptcy Court's decision in the *Gencor* case is particularly instructive on this point. The creditors in *Gencor* claimed that the Debtor should have known of their existence because of protracted litigation between them (several years prior to the petition date), as well as prior correspondence concerning potential infringement claims (several years prior to the petition date). *Gencor*, 298 B.R. at 913-14. For its part, the Debtor argued that the creditors were unknown claimants, and that the Debtor could not be expected to remember a demand letter written four years previously. *Id.* at 914. The bankruptcy court ultimately found a material factual dispute as to whether the creditors were known or unknown claimants:

> [t]he Court cannot determine whether the defendants were known or unknown creditors or whether Gencor made a reasonably diligent search to identify the defendant's claims. Nor can the Court assess whether, even if the defendants were unknown creditors, Gencor made any attempt to provide the required publication or constructive notice or whether the defendants had actual knowledge of the claims bar date. Given the fact that their sister corporation, CMI Terex, had knowledge of the claims bar date, it certainly is possible that these remaining two defendants also had notice. If there are genuine issues as to any material facts, summary judgment should not be granted. Therefore, the Court denies both parties' cross motions for summary judgment on the issue of whether the defendants' claims are subject to the discharge injunction.
>
> To resolve the remaining issue raised in this adversary proceeding, **the Court will conduct an**

> **evidentiary hearing to determine whether Gencor knew of the defendants' claim** at the time Gencor completed its schedules, whether Gencor could have discovered the defendants' claim through a reasonably diligent search or whether Gencor could reasonably have believed that the defendants had abandoned its claim, and whether the defendants had actual knowledge of the claims bar date . . . .

Gencor, 298 B.R. at 917 (emphasis added).

The *Gencor* decision underlines the point that a determination of whether a party is a known creditor presents questions of fact that should be resolved through an evidentiary hearing. Because that hearing may turn on the credibility and state of mind

of the witnesses, none of the foregoing decisions attempted to resolve these questions on summary judgment. Indeed, the Supreme Court acknowledged in Tulsa Professional that the record before the Court was insufficient to make this determination. *Tulsa Professional*, 485 U.S. at 491. A fortiori, this determination should not be made on a motion to dismiss, where there has been no record development, and where the well pled allegations of the Complaint must be taken as true.

The authorities cited by the Otto Entities do not change this analysis. *See* Appellees' Brief at 32 ("the Photographers fail to address case law consistently holding that whether an entity is a "known" creditor is a legal conclusion"). While the absence of jump cites makes it difficult to pinpoint the precise passages relied upon by the Otto Entities, with one exception (which will be discussed below), the cases cited by the Otto Entities do not appear to provide

any support for the argument that known creditor status presents a question of law. *See Tulsa Professional*, 485 U.S. at 491 (court remands for a determination as to whether creditor was known or reasonably ascertainable); *In re Texaco Inc.*, 182 B.R. 937, 954-57 (Bankr. S.D.N.Y. 1995)(following evidentiary hearing, court **finds as a fact** that Texaco had no reason to know the Sanders were prospective claimants; court **finds as a matter of fact and law** that the Sanders were unknown creditors who were properly served via publication notice)(emphasis added)[7]; *In re Best Products Co., Inc.*, 140 B.R. 353, 356-60 (Bankr. S.D.N.Y. 1992)(unknown creditors not permitted to file late claim; opinion does not reflect any effort by the creditors to establish or prove they were known creditors); *In re Brooks Fashion Stores*, Inc., 124 B.R. 436, 442-45 (Bankr. S.D.N.Y. 1991) (court finds, on Debtor's motion for summary judgment, that state agency was not a known creditor).

Only one case cited by the Otto Entities supports the proposition that a claimant may be ruled an "unknown creditor" in the context of motion to dismiss—*In re U.S.H. Corp. of New York*, 223 B.R. 654 (Bankr. S.D.N.Y. 1998)(Lifland, J.). In the *U.S.H.* case, Judge Lifland dismissed a complaint filed by a group of homeowners, seeking an order (i) determining that they were not bound by the Debtor's confirmed plan of reorganization and (ii) authorizing them to pursue their pre-bankruptcy claims against the Debtor. *Id.*, 223 B.R. at 656. In so ruling, Judge

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[7] The finding of law in this case appears to relate to the court's conclusion that publication notice was sufficient where directed to an unknown creditor. This reading is bolstered by the statement a page earlier, wherein the court finds as a matter of fact that the Sanders were unknown creditors.

Lifland concluded that the plaintiffs were not entitled to prove their allegation that they were known creditors of the Debtor:

> [g]iven the pleadings and arguments presented to this court, there are no set of facts under which I could find the Plaintiffs were known creditors of U.S. Home before or at the time of confirmation. The Plaintiffs do not counter the crucial contention pled and affirmed by affidavit by U.S. Home, that there is no building code, standard or law which required U.S. Home to build according to CAT-POOL standards. Without the linchpin of a duty of U.S. Home to build in accordance with CAT-POOL standards, U.S. Home could not have been expected to discover any potential claim of the Plaintiffs prior to confirmation, particularly one so remote. It was not the duty of U.S. Home to search out each conceivable or possible creditor. If the Plaintiffs were to be considered known creditors at the time of the confirmation, the universe of creditors entitled to actual notice would defeat the purpose of title 1 1's expedited and cost effective claims resolution process.
>
> Given the facts presented to the court it is absurd for Plaintiffs to attempt a demonstration at trial that they were "known" creditors, and thus should not be bound by the Confirmation Order and discharge provisions of the Plan and Bankruptcy Code.

Id., 223 B.R. at 660 (internal citations and footnotes omitted).

The Photographers respectfully submit that this decision is neither well reasoned nor binding upon

this Court, and should not be followed. In all of the other cases cited on this point by both parties, the court only determines known creditor status on a fully developed record. The Supreme Court remanded the *Tulsa Professional* case for this very reason. *See Tulsa Professional*, 485 U.S. at 491. Likewise, the district court in *Armstrong* found material factual disputes on this point; while the bankruptcy court in Gencor confirmed it could not decide the issue without an evidentiary hearing. *See Armstrong*, 130 F.R.D. at 452-53; *Gencor*, 298 B.R. at 917. By deciding the issue on a motion to dismiss, Judge Lifland deprived the plaintiffs of the opportunity to prove their well pled allegations, while relying upon an affidavit from the Debtor. *U.S.H.*, 223 B.R. at 660. In addition to the fact that an affidavit has no place in the briefing of a motion to dismiss, it appears that Judge Lifland accepted the allegations of the Defendant Debtor as true, while disregarding or discounting the allegations of the Plaintiff homeowners. In so doing, he turned the standard for reviewing a motion to dismiss on its head.

Moreover, Judge Lifland appears to have based his conclusion that the homeowners were unknown creditors on his supposition that, "[w]ithout the linchpin of a duty of U.S. Home to build in accordance with CAT-POOL standards, U.S. Home could not have been expected to discover any potential claim of the Plaintiffs prior to confirmation, particularly one so remote." *Id.* But this supposed connection between duty and knowledge makes no sense. One can easily envision the Debtor learning of a putative claim based upon the breach of a non-existent legal duty. And one can also envision the Debtor not being made aware of a claim founded on the breach of a well-established legal duty. Simply stated, duty and

knowledge are wholly separate and distinct concepts, and the presence or absence of a legal duty is wholly irrelevant to whether the party claiming a breach of that duty is a known creditor.

Perhaps most tellingly, Judge Lifland states in *U.S.H.* that "it is absurd for Plaintiffs to attempt a demonstration at trial that they were "known" creditors." *Id.* This statement confirms that, on a motion to dismiss, Judge Lifland tested the ultimate evidentiary merits of the claim, and found them lacking. But that ultimate determination should only have been made following a comprehensive summary judgment briefing (with a meaningful opportunity for discovery), or an evidentiary hearing. Because the *U.S.H.* decision was made on an incomplete and one-sided record, it should not be deemed persuasive authority for the proper resolution of the instant motion to dismiss.

B. The Photographers' Statement of Their Claim Was More Than Sufficient for Federal Notice Pleading Standards.

In his order granting the Motion to Dismiss, Judge Lifland found that the Photographers' allegations were insufficient, owing to their failure to allege that "a proper examination of the books and records would have uncovered their claim." R-28 at 11, *citing In re U.S.H. Corp. of New York*, 223 B.R. 654 (Bankr. S.D.N.Y. 1998).[8] This formulation of the known creditor test is unduly narrow, and is based primarily on a conclusion reached in the *U.S.H.* case without citation to other authority. *U.S.H.*, 223 B.R. at 659. The Supreme Court has held that actual notice is

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[8] The Otto Entities also adopt this theme in the last section of their brief. Appellees' Brief at 34-39.

required for known or reasonably ascertainable creditors. *See Tulsa Professional*, 485 U.S. at 490 (emphasis added). A creditor might be reasonably ascertainable, yet not listed in the Debtor's books and records. *See Fogel v. Zell*, 221 F.3d 955, 963 (7th Cir. 2000).

For example, in *Fogel*, the City of Denver sought to challenge an injunction barring it from suing Samuel Zell and certain of his affiliates. *Id.*, 221 F.3d at 958. The Seventh Circuit held that Denver had not received constitutionally sufficient notice of the settlement implementing the injunction. *Id.* at 966. In so ruling, the Seventh Circuit decisively rejected the contention that Denver was an unknown claimant:

> [t]his is a multimillion dollar bankruptcy, the potential claimants were all purchasers of a product manufactured by the debtor's predecessor, and Denver in particular was a large purchaser. (We don't know what I paid, but we know that it bought and installed at least five miles of Interpace pipe.). Other pipe claimants had filed multimillion claims. The suggestion that the trustee could not have discovered that Denver had purchased a large quantity of the defective pipe strikes us as risible.

Id. at 963.

In *Fogel*, the Seventh Circuit rightly acknowledged the possibility that a claimant could become known through its overall course of dealing in the marketplace, as well as its prior transactions with the Debtor. It therefore makes no sense to require the Photographers to plead that their claims would have been disclosed by a review of the Debtor's books and records. This requirement is narrower than the requirements set forth in the controlling Supreme

Court cases, and could rule out many other ways in which their claims could become known to the Otto Entities.

Even more to the point, the Photographers have pled their status as known creditors with all the specificity required by the Federal Rules of Civil Procedure. *See Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). As the Supreme Court has made plain,

> . . . the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests . . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Id. at 47; *see also Wynder v. McMahon et al.*, 360 F.3d 73, 76-77 (2d Cir. 2004)(more extensive pleading of the facts is not required under Rule 8(a) because the Federal Rules provide other devices besides pleadings to define the facts and issues).

The Photographers have alleged, *inter alia*, that (i) they were never given any notice that relief would be sought against them in the Spiegel bankruptcy case (R-10, ¶ 12), (ii) they were never given notice of the release contained in Spiegel's plan (¶ 16), (iii) the complaint filed by Peter Rosenbaum Photography Corp. in Illinois put Spiegel and the Otto Entities on notice that there were outstanding claims against them related to numerous photographs utilized by

the Otto Entities, including those taken by the Photographers (¶ 21), (iv) the Photographers were known creditors of Spiegel, and parties to an agreement with Spiegel (¶ 24), (v) the Otto Entities knew or should have known that the plan granted relief for their benefit and against the Photographers, and that the Photographers were therefore entitled to notice of such relief (¶25), (vi) the Photographers did not receive notice of the plan and disclosure statement or the release contained therein (¶ 26), (vii) the Otto Entities and Spiegel were aware that liability had been asserted with respect to unauthorized use of copyrighted photographs (¶ 31), (viii) the plan and disclosure statement were not served upon the Photographers, notwithstanding that they knew or should have known their requested release purported to grant relief against the Photographers (¶ 34), (ix) the Otto Entities knew or should have known that they were seeking relief against the Photographers (¶ 63), (x) the Photographers were known entities entitled to actual notice of the plan and disclosure statement, as well as the proposed entry of the release (¶ 64), (xi) the Otto Entities and Spiegel failed to provide the Photographers with such actual notice (¶65) and (xi) the failure to give actual notice to the Photographers violated their rights of procedural and substantive due process, and rendered the release unenforceable as it pertains to the Photographers (¶ 66). These allegations are detailed, specific and more than sufficient to state a claim under Fed. R. Civ. P. 8 (a). It was reversible error to require further detail, or otherwise to deem these allegations insufficient.

CONCLUSION

Under well established federal practice and procedure, a plaintiff need only allege facts sufficient to put the defendant on notice of his claim. The Photographers more than met this burden in their initial Complaint. The well pled facts set forth in the Complaint state a claim that the Photographers were denied due process, and that the Release and Injunction therefore may not be enforced against them. By dismissing the Complaint, the Bankruptcy Court held the Photographers to a standard beyond that set forth in Rule 8(a), ignored the well pled facts of their Complaint, and imposed the facially inapplicable requirements of 11 U.S.C. § 1127(b) and Fed. R. Civ. P. 60(b). All of these rulings were in error, and should be overturned. The order granting the Motion to Dismiss should be reversed, and the Otto Entities should be directed to answer the Complaint within ten days of such reversal.

Respectfully submitted,

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